MOTION, NOTICE, AND ADDITIONAL
BEHALF OF DEFENDANTS

The undersigned, of counsel for plaintiff in error in the above-entitled cause, do hereby acknowledge service of a copy of the foregoing motion and notice and of the additional brief hereto attached this 24th day of December, 1904.

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SUPREME COURT OF THE UNITED STATES.

HENRY MUHLKER,
Plaintiff in Error,

against

THE NEW YORK AND HARLEM RAILROAD COMPANY and THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
Defendants in Error.

Additional Brief on behalf of Defendants in Error.

Upon the oral argument some propositions were argued and certain questions were asked which have suggested doubt as to whether the exact position of the parties in this action in this Court have been quite clearly presented either by the oral arguments or by the briefs.

The learned counsel for the plaintiff, in his oral argument, laid great stress upon the trial Court's seventh finding or conclusion. The point which we wish to make perfectly clear is the character and status of that finding, as, under the New York State law, it constituted a subject matter upon and concerning which the jurisdiction of the Court of Appeals might be invoked and exercised, and as to the effect upon that finding or conclusion, of the reversal of the judgment by the Court of Appeals upon the ground that that finding or conclusion was not sustained by any evidence.

The plaintiff's position is:

(1) That he has, as appurtenant to his lot abutting upon Park Avenue, certain property rights, consisting of easements, over the entire strip of land, 140 feet in width, within the exterior lines of Park Avenue;

(2) That such property rights were created or grew out of certain instruments of grant and of the street opening proceedings;

(3) That such instruments of grant and the street opening proceedings constituted in favor of plaintiff and against defendants and all the world, a contract obligation that Park Avenue shall be kept open as and for a public street and for no other purpose;

(4) That the maintenance and use of the railroad structure

complained of is inconsistent with street use, and therein violates these contract obligations;

(5) That the trial Court found that the plaintiff had suffered actionable damage;

(6) That the Court of Appeals reversed the judgment below and dismissed the complaint upon the ground that Chapter 339 of the Laws of 1892 constituted lawful authority for such maintenance and use of this railroad structure without compensation to plaintiff;

(7) That said enactment as thus construed and administered by the Court of Appeals, is violative of the Federal Constitution in that (1) it impairs the obligations of the said contracts, and (2) it deprives plaintiff of the amounts awarded him by the trial Court as damage and compensation, respectively, and thus deprives him of his property without due process of law.

Plaintiff rests his whole contention upon the decisions in the elevated railroad cases, and recognizes no distinction between those cases, in which, after the opening, regulating and grading of the street, all of character strictly conformable to the provisions of the Act of 1813, and without any consent of the abutting owner, the elevated roads were constructed, and Park Avenue, which was neither opened, regulated, graded nor paved at the time of the construction of the Harlem road, but was opened many years after such construction, and then only to a partial extent, the street opening proceeding to acquire title to the land not being taken until 1850 and consummated in 1853; and the avenue to its full width never having been actually opened, regulated, graded or paved until after the erection of the structure complained of under the Act of 1892. Prior to and until that time, Park Avenue consisted of two streets, one on each side of the railroad, the strip of land occupied by the railroad never having, until the erection of the structure under the Act of 1892, been a public street for any purposes whatsoever.

The defendants have not sought to attack or overthrow the elevated railroad decisions; they admit and contend that those decisions are in full force and effect in the State of New York, but they claim that the conditions with respect to Park Avenue as affecting both the abutting property owners and the railroad companies are other and far different from those which have obtained in the streets in which the elevated railroads have been constructed.

The position of the defendants is:

(1) That the Act of 1892 does not in any manner take or authorize the taking of any private property without compen-

sation, nor has it in any manner impaired the obligation of any of plaintiff's contract rights, nor has it taken from him any right or remedy in respect to the enforcement of any such contract rights;

(2) That the Legislature of the State of New York had the right, both in the exercise of its police power for the purpose of improving the avenue, and under the authority reserved in the Charter of the Harlem Company, to pass the act providing for the maintenance and use of the elevated viaduct structure within the bounds of and upon and over the strip of land, which at the time of the enactment was, rightfully as against plaintiff, possessed, occupied and used exclusively by and for the railroad;

(3) That the decision of the Court of Appeals is a determination that the plaintiff's contention that he owned and was entitled to possess the property or property rights which he claimed were trespassed upon or taken, in and by the carrying into effect of the Act of 1892, is fully met, answered and overthrown by the finding and conclusion that as against plaintiff defendants had acquired the right to exclusively possess and occupy the same 60-foot strip of land and thereon to maintain and operate their railroad as they had done prior to the 1892 enactment.

Plaintiff upon the argument relied principally upon his alleged contract rights, and apparently relied upon the "Seventh" finding of the trial court to the effect that he had suffered actionable damage.

In attempting, however, to take advantage of this finding in this Court he is met by an insuperable difficulty, in that this railroad structure is wholly upon ground which prior to 1892 was possessed, occupied and used exclusively by and for the railroad, and this leads to a consideration of what the findings of the State Court, as they come to this Court, are.

It is to be observed, first, that by the "Ninth" finding of the trial court the defendants were not liable for the structure upon and within which its four tracks were operated prior to the erection of the structure under the Act of 1892. That structure was enclosed by retaining walls wholly excluding any street use, and was admitted by counsel for plaintiff upon the argument, to have been inconsistent with street use. This "Ninth" finding has been confirmed by all the State courts. It is in full force and effect here, and is not attacked by plaintiff here.

In the second place, the Court of Appeals has found and adjudged that the "Seventh" finding of fact was not sustained by any evidence, the effect of which is a finding of the highest State Court, that no actionable damage has been sus-

tained by plaintiff, that is, that none of his property has been taken or trespassed upon.

The right of presentation of this question to and for the determination of the Court of Appeals, in case of the decision of the Appellate Division not being unanimous, was saved in favor of the defendants, by their motion interposed in the trial court at the close of the entire testimony, asking dismissal of plaintiff's complaint, upon, among others, the following grounds:

> "1. That the plaintiff has failed to show that he had any property rights which were or have been taken by the defendants, or either of them" (printed record, page 61);

and defendant's exception to the order denying that motion (printed record, page 63).

Having in view the trial court's "Seventh" finding or conclusion "That the said permanent structure and the operation by said defendant The New York Central and Hudson River Railroad Company of passenger trains thereon since February 16th, 1897, are and have been a continuous trespass upon the plaintiff's easements of light and air appurtenant to his said premises, hereinbefore described," causing damage in the sums named and awarded; and the Court of Appeals judgment that the judgments of the lower courts be reversed and the complaint dismissed, the crucial question presented is: Upon what grounds did the Court of Appeals thus determine and adjudge?

The plaintiff's contention is that the Court of Appeals had no jurisdiction to inquire into or determine the question of the correctness of the above finding or conclusion of the trial court, and hence that the Court of Appeals was obliged to and did accept that finding or conclusion as binding and conclusive upon it, and in the face of and notwithstanding such legal force and effect of that finding or conclusion, held and adjudged that the 1892 enactment constituted lawful authority for the maintenance and use of the said railroad structure without compensation to plaintiff.

The defendants' contention is that the Court of Appeals possessed and exercised the province and jurisdiction of searching the record for the purpose of ascertaining and determining whether that finding or conclusion of the trial court was sustained by *any* evidence, and upon and by reason of its determination that the finding or conclusion was not thus sustained, determined and adjudged that plaintiff's property had not been taken or trespassed upon; that the damage awarded was not occasioned by, and was not the result of any actionable wrong, but was merely consequential to and upon

lawful exercise of lawful right as against plaintiff, and therefore *damnum absque injuria*.

The question as to which of these grounds the Court of Appeals was empowered to and did proceed upon is answered by reference to section nine of article six of the State Constitution, and sections 190, 191 and 1337 of the Code of Civil Procedure. The paragraph of section nine of article six of the State Constitution, here in question, reads as follows:

> "No unanimous decision of the appellate division of the supreme court that there is evidence supporting or tending to sustain a finding of fact or a verdict not directed by the court, shall be reviewed by the court of appeals."

The first part of subdivision 1 of section 190, reads as follows:

> "Appeals may be taken as of right to said court, from judgments or orders finally determining actions or special proceedings." * * *

Section 191, subdivisions 3 and 4, read as follows:

> "3. The jurisdiction of the court is limited to a review of questions of law.
>
> 4. No *unanimous* decision of the appellate division of the supreme court that there is evidence supporting or tending to support a finding of fact or a verdict not directed by the court, shall be reviewed by the court of appeals."

The portion of section 1337 pertinent hereto, reads as follows:

> "* * *; but where the justices of the appellate division from which an appeal is taken are divided upon the question as to whether there is evidence supporting, or tending to support, a finding or verdict not directed by the court, a question for review is presented." * * *

The essential issue of fact submitted for determination was that presented by plaintiff's affirmance and defendants' denial that the defendants' maintenance and use of the successive respective railroad structures constituted a taking of or trespass upon plaintiff's property, to wit: his easements in Park Avenue appurtenant to his described abutting premises, to his damage in the sums alleged.

Upon the issue of the alleged trespass the evidence submitted at the trial presented no substantial conflict of fact.

The trial court's "Seventh" finding or conclusion that the maintenance and use of the elevated viaduct railroad structure "are and have been a continuous trespass upon the plaintiff's

easements," was based entirely upon the trial court's legal conclusion arising from or upon the matter of law view taken by it of the evidence pertaining to that issue, and not upon determination of a question of fact arising upon or in respect of conflicting evidentiary facts.

The case came to the Court of Appeals upon an affirmance by the Appellate Division of the judgment at Special Term. It did not affirmatively appear in the record of the case that the decision of the Appellate Division was unanimous, and hence the Court of Appeals could not find that there was unanimity.

Kaplan *vs.* N. Y. Biscuit Company, 151 N. Y., 171.
Laidlaw *vs.* Sage, 158 N. Y., 73.

In the case at bar, it appears affirmatively on pages 71 to 73 of the printed record, in the recital, "Van Brunt, *P.J.*, dissents," that the decision of the Appellate Division was not unanimous.

This being the situation, the Court of Appeals had power to look into the record to see whether there was *any* evidence to support the facts found by the trial Court, which is a question of law for the Court.

Otten *vs.* Manhattan Railway Company, 150 N.Y., 395.
Griggs *vs.* Day, 158 N. Y., 1.
Ostrom *vs.* Greene, 161 N. Y., 353.
Jerome *vs.* Queen City Cycle Company, 163 N. Y., 351.
Henken *vs.* Schwicker, 174 N. Y., 298.
Dunlap & Co. *vs.* Young, 174 N. Y., 327.

In the first of these cases, the Court, per Vann, *J.*, say, at page 401:

> "Whether there is a question of fact in a case is always a question of law, depending possibly upon a conflict of evidence, and possibly upon conflicting inferences which may be drawn from uncontradicted evidence."

In Griggs *vs.* Day the Court, per Haight, *J.*, say, at page 10:

> "Where the facts are controverted and they must be determined from conflicting testimony or inferences drawn from the surrounding facts, the question becomes one of fact and not of law, and this Court has no power to review. But where the facts are conceded or are not controverted, a question of law arises as to the judgment that should be given thereunder."

Ostrom *vs.* Greene was an appeal from a judgment of the Appellate Division affirming a judgment in favor of the plain-

tiff, entered upon a decision of the court after a trial without a jury. The Court, per Vann, *J.*, say at pages 356, 357:

"The trial court found * * *. The findings were excepted to, but under the rules governing appeals to this court, those relating to the facts of the case are conclusive, unless it appears that they were made without evidence to support them. According to our judicial system the trial courts and the appellate divisions finally pass upon all questions of fact, and the power of the Court of Appeals is limited by the Constitution 'to the review of questions of law.' Whether there was any evidence to support a fact found is a question of law, which, when the affirmance by the Appellate Division is not unanimous, we can review, but in no other way can we deal with a question of fact in a civil case, even if we think it has been improperly decided."

The case of Jerome *vs.* Queen City Cycle Company was an appeal from a judgment of the Appellate Division affirming a judgment entered in favor of the plaintiff after a verdict of a jury. The Court, per Vann, *J.*, say, at page 357:

"* * * As the judges of the court below do not appear to have been unanimous in their decision, we have the right to read the record in order to see whether there was any evidence which, according to any reasonable view, would sustain the conclusion of the jury. If the undisputed facts, in connection with the testimony of the plaintiff, when supported by every inference that can properly be drawn therefrom, do not warrant the verdict, a question of law arises, which we can review. Uncontradicted facts, with the logical deductions therefrom all pointing in the same direction, present a question of law for the court, and not a question of fact for the jury. * * *"

The case of Henken *vs.* Schwicker was an appeal from an order of the Appellate Division reversing a judgment in favor of the defendant entered upon a decision of the Court after a trial without a jury. The Court, per Werner, *J.*, say, at page 300:

"The learned trial Court held with the defendants, and decided * * *. The decision was in the short form. The learned Appellate Division reversed the judgment entered upon this decision. The order of reversal, being silent as to the facts, must be presumed to have been based solely on questions of law. As there is no contest over the rulings of the trial Court in the reception and rejection of evidence, there are only two questions open for review upon this appeal:

1. Is the finding of fact, upon which the judgment herein is founded, supported by any evidence?

2. Is the conclusion of law supported by the finding of fact? * * *."

The case of Dunlap & Co. *vs.* Young was an appeal from an order of the Appellate Division reversing a judgment in favor of the defendant after a trial by the Court without a jury. The Court says, per Curiam, at page 329:

> "The order of the Appellate Division does not state that the reversal was upon a question of fact, and, consequently, we must presume that it was on the law. In this condition of the record there are only three questions of law which we are permitted to examine: (1) Whether a material error was committed in receiving or rejecting evidence; (2) whether the conclusion of law is supported by the facts found; (3) whether any material finding of fact is without evidence to support it." * * *

In and by the exercise therein of the jurisdiction which it asserted and exercised in the cases cited the Court of Appeals undertook and assumed the determination of the question whether there was any evidence sustaining or tending to sustain the trial Court's finding or conclusion that in and by the maintenance and use of this elevated viaduct structure upon and over land theretofore rightfully as against plaintiff, occupied and used exclusively for railroad purposes, and thus maintained and used in obedience to the command of the State, having for its purpose the enlargement of the surface of this avenue for public travel, the plaintiff's easements had been taken or trespassed upon; and, in view of the entire record in the case, held and adjudged that the trial Court's finding or conclusion, that the maintenance and use of the elevated viaduct structure constituted a trespass upon plaintiff's easements, was not sustained by any evidence.

Having reached the above conclusion the Court of Appeals deemed and treated that unsustained finding as erroneous in law, and the judgment founded thereon subject to reversal on that ground.

The case, therefore, comes to this Court with the finding and conclusion of the State Court of highest jurisdiction thereof that upon the undisputed facts appearing in the record the plaintiff has not suffered any actionable damage.

The defendants claim that this determination is simply an application of the rules and principles of local property law in force prior to the enactment of 1892, and remaining in force unaffected thereby, to the status of property right resulting from the grants expressed or implied antedating that enactment, and so presents no Federal question, and this is fully discussed in the main brief.

Under the procedure in the State of New York the Court of

Appeals could not have reached the conclusion which it did reach and reverse the judgment in the case at bar without having determined as above indicated that as matter of law the "Seventh" finding could not be sustained, and so declared the law of the case by reversing the judgment and dismissing the complaint.

The rule of law thus applied and administered, and in and by the application and administration of which the case was effectually and fully controlled and disposed of by the Court of Appeals, was as clearly and manifestly the rule of the local law of the State as was that which was held to control in the respective cases of *Radcliff's Executors* vs. *Brooklyn* (4 N. Y., 195); *Eldridge* vs. *Trezevant* (160 U. S., 452); *Pennsylvania College Cases* (13 Wall., 190); and *Marchant* vs. *Pennsylvania R.R. Co.* (153 U. S., 380).

This statement of the method in and by which the Court of Appeals reached its determination is a sufficient statement of the grounds of its decision, but further light as to the grounds upon which its decision was based is found in its opinion in this case and in other cases arising from the same or similar facts, notably the *Conabeer*, *Lewis*, *Fries* and *Welde* cases, which are set forth in full in the supplement to the brief of defendants in error, from which opinions we quote the following:

Conabeer case (Supp. to Brief, p. 64):

> "It is obvious that when the deed by Mrs. McGown to the New York and Harlem Railroad Company was given, it was understood between the parties that its railroad was to be built upon an embankment or viaduct in Fourth avenue, as it expressly provided not only that the grantee should have twenty-four feet of land in the center of the avenue during its corporate existence upon which to construct its railroad, but it also conferred upon the company the right to slope its embankment to the full width of the street. It is equally apparent that the grantor intended to confer upon the railroad company the right to construct, maintain and operate a steam railroad upon the premises so conveyed, and to thereby release it from any damages to her adjoining property arising from the proper exercise of that right. *Thus the property* now owned by the plaintiff which adjoins Fourth avenue *became burdened with the easements or right of the company to maintain and operate its railroad at that place*, so that neither the owner, nor her grantee, could recover damages for any injury to the property arising from the contemplated use, and could in no way interfere with the proper exercise of that right by the railroad company during its continuance."

(*Id.*, pp. 68, 69):

"In the case at bar the street at the place where the defendants' railroad was constructed was never opened or used as a public street of the city. The streets in Fourth avenue were, by the command of the statute, laid out upon either side of the railroad structure, and were the only streets ever actually opened in that avenue. So that the plaintiff never acquired or possessed any right to the use of Fourth avenue as a public street, except such as she now enjoys.

This case is *clearly distinguishable from the elevated railroad cases* upon which the plaintiff relies. *In those* cases there was *no grant by the abutting owners* of the right to use the street for the purposes for which it was used, and the appropriation of the street was held to be illegal, *while here* the use of the street was *legalized by a grant from the plaintiff's grantor*, as well as by the legislature and municipal authorities."

(*Id.* p. 70):

"Under the circumstances of this case, it is manifest that the abutting owners who derived their title from Mrs. McGown subsequent to her grant to the New York and Harlem Railroad Company were not entitled to have that portion of the avenue upon which the defendants' viaduct stands opened as a part of the public street, but that *the only streets* for public use which existed in Fourth avenue, or *to the use of which they were entitled*, were streets forty-two feet in width *upon each side* of the viaduct occupied by the defendants."

Lewis case (*Id.* p. 71):

"The plaintiff claims that the trial court erred in refusing to allow her damages for the effect of the new structures, both temporary and permanent, without considering the effect of the old structure. The defendants claim that the court erred in awarding any damages, or giving any relief whatever, to the plaintiff, because, as against her, they had the right to erect any railroad structure in the street, of any height, within the lateral lines of the old embankment."

(*Id.* p. 74):

"The plaintiff's appeal rests upon the proposition that she is entitled to the same relief that she would have been if there had been no railroad structure in the street prior to the erection of the steel viaduct."

(*Id.* p. 75):

"The easements of light, air and access, so far as they

had any practical existence prior to 1853 when the avenue was opened, were encroached upon by the first railroad structure, which, in front of plaintiff's premises, was a solid embankment 28 feet wide at the bottom and 10 or 12 feet high, walled in with stone. From 1853 until 1873, when the first improvement required by statute was made, the avenue was open and used as a street on either side of the railroad structure in the center, which continued to encroach upon the easements of the abutting owners. From 1873, when the embankment was converted into a viaduct 56 feet wide and 7 feet high in front of the *locus in quo* until 1894, when the last improvement required by statute was begun, the same encroachment continued. As to the plaintiff and her grantors there was an open, continuous and exclusive possession and enjoyment by the railroad company of the easements in question to the extent of the user during the periods named."

(*Id.* pp. 75, 76):

"The possession of the defendants was not subordinate to the plaintiff's title, nor permissive as to her, but openly hostile and necessarily known to be such, to her and her grantors, who made no objection until 1897. It was exclusive, definite and uninterrupted, for it absolutely excluded all from the part of the avenue occupied by the railroad structures. The obstruction was not out of view or knowledge, but in plain sight of the abutting owners, who, by making no objection, acquiesced in the situation. The question does not arise between the railroads and the city, which had consented in advance to the occupation, but between the railroads and the abutting owners, who had not so consented. Under these circumstances the old structures had stood in the street so long that the railroads acquired a prescriptive right to have them stand there forever, so far as the plaintiff is concerned. *The situation was the same in effect as if one of her grantors, while he owned her property, had conveyed to the defendants the right to permanently keep the stone viaduct where it stood and to use it indefinitely for railroad purposes.* To the extent of the user by the companies the plaintiff, through the acquiescence of herself and her grantors had parted with her rights when the present structure was erected. She could claim no damages on account of the old structure, so long as it stood there. She could claim no damages on account of any new structure erected in the same place, within the same lines, and for the same purpose, which inflicted no more injury upon her property than the old. *She could raise no question*

except such as she could have raised had she given a deed expressly assenting to the erection of the old structure."

Welde case (*Id.*, pp. 80, 81):

"The defendants' railroad is constructed and operated in this street, and has been for over sixty years. In January, 1832, one Isaac Adriance, the plaintiff's remote grantor, then owned the land described in the complaint and the land comprising what is now the bed of Park avenue or the street in question. At that time he executed and delivered to the Harlem Railroad Company a deed of a strip of land twenty-four feet in width in the center line of this avenue from the southerly side of One Hundred and Twenty-fourth street to One Hundred and Twenty-seventh street, 'together with the power of sloping their embankments or excavations so much farther beyond the lines of said premises hereinbefore granted as may be necessary to support their works, not, however, extending beyond the width of the avenue.' As the avenue was then one hundred feet wide, that was the utmost extent of the grant to the railroad, and it is conceded that whatever rights the defendants acquired under this grant may be asserted against the plaintiff, who has succeeded to the title of Adriance and is bound by any consent or conveyance by him for railroad purposes. It will be seen by the terms of this grant that the railroad was authorized, when necessary, to support the work, to place an embankment in the street to the width of one hundred feet at the bottom in order to procure a proper slope. It is also apparent that wherever it was necessary to make rock cuts or excavations through high ground, that the railroad was authorized to make excavations one hundred feet in width at the surface of the ground, or at least if that was necessary in order to give the proper slope to the excavation. *The question arises as to the proper construction of this conveyance.* It is obvious that the railroad and not the grantor was to be the proper judge to determine where excavations and embankments were necessary and the proper width and slope of the same within the limits of the one hundred feet. Whether the reasonable and practicable construction of this grant is that the railroad acquired thereby the consent of the property owner to the construction and maintenance of a railroad in the street as then laid out to the width of one hundred feet, or is limited to less than that by other considerations, is a question that would appear to be involved in the case, but may not be necessary to decide in view of the condition of the present record."

(*Id.*, pp. 82, 83):

"The findings of the court, as they appear in the present record, naturally suggests the following questions:

(1) *Did the Adriance deed, before referred to, operate as a consent by the plaintiff's predecessor in title to the maintenance and operation of the railroad in front of his premises in this street, covering a space not to exceed one hundred feet wide?*

(2) *Does the present viaduct structure, so far as it occupies this one hundred feet space, constitute any trespass or invasion of the plaintiff's droperty rights*, and, if so, to what extent? (*Conabeer* v. *N. Y. C. & H. R. R. R. Co.*, 156 N. Y., 474).

(3) *In view of the grant from the plaintiff's predecessor in title*, already referred to, and the acts of the legislature above mentioned, is this viaduct structure, upon which the railroad is operated, rightfully and lawfully in the street?

(4) This structure having been erected under the authority of the state itself, in a public street, in order to improve the street for public travel, can the plaintiff maintain an action to enjoin the operation of the railroad, or to recover damages against the defendants, in consequence of the existence of the structure, or its use by the defendants?

(5) The structure, including the changes made subsequent to the year 1896, having been erected in pursuance of the command of the legislature and in precise conformity with the plans and specifications indicated in the statute, *has the plaintiff any right of action* against the defendants *to enjoin* the operation of the railroad, *or to recover damages, in so far as the structure exists*, within the original limits of the street, that is to say, *within the one hundred feet?*"

Fries case (*Id.*, pp. 85, 86):

"There is considerable discussion upon the briefs of counsel who have argued the case concerning the effect of a deed to the railroad by the former owner of the plaintiff's property and many other details relating to the right of the railroad to construct and maintain the same in the street in front of the premises in question.

I cannot perceive how these questions can be of much consequence in the disposition of this appeal, since the trial court made an express finding that *under this deed* various resolutions and acts of the city authorities at various times and under certain statutes referred to,

and by lapse of time and the acquiescence of the plaintiff and his predecessors in title, the defendants, '*acquired the right* without liability to the plaintiff to have, maintain and use their railroad and railroad structures as the same were maintained and used prior to February 16th, 1897, as hereinbefore described.' Here we have an express finding that on and prior to the date named the defendants were entitled to have and maintain their railroad in the street in question *as against the plaintiff* and all the world, without let or hindrance from any one, and surely there could be no trespass upon the plaintiff's rights prior to that date. The trial court also found how the railroad had been maintained and operated on and prior to the date mentioned, as follows: 'The said railroad prior to February 16th, 1897, was operated along the center of said Park Avenue in front of the plaintiff's premises in a depressed cut about fourteen feet below the surface of said Park Avenue and sixty-one feet and eight inches wide, which said railroad cut was bounded on each side by parapet walls of about two feet six inches above the surface of said avenue, which said embankment or viaduct cut off access from one side of said avenue to the other, except at the intersection of 128th and 129th street, at which points there were bridges for vehicles and foot passengers across the said railroad cut.' *According to this finding the defendants had the right to maintain a railroad in front of the plaintiff's premises that practically cut him off from access to the opposite side of the street* except by means of bridges located at intersecting streets."

(*Id.*, p. 88):

"The railroad originally covered nearly 62 feet of the street surface. Now the elevated structure covers only 59 feet above the surface."

(*Id.*, p. 89):

"The elevated railroad cases in this court proceed upon the principle that, as against abutting owners, the railroad was unlawfully in the street, as *they had not consented to the construction or conveyed the right* to interfere with their easements. But in the case at bar we have an express finding that the defendant *had acquired the right as against the plaintiff* to use the street for the operation of the railroad. Hence, the principles upon which that mass of litigation proceeded have no application to this case, and so this court has held."

Muhlker case (*Id.*, pp. 97, 98):

"The facts in this case present the same question

that was before this court in the *Lewis Case* (162 N. Y. 202) and the *Fries Case* (169 N. Y. 270) and that is, whether defendant is liable for any damages that may have been sustained by plaintiff by reason of the interference with his easements of light air and access by the erection of the viaduct upon which its trains are now being run.

Defendant was incorporated in 1831, and in 1832 it took from one Poillon a deed to a strip of land 24 feet wide in the center of what is now known as Fourth avenue, in the city of New York, along which the premises belonging to plaintiff are situated. Subsequently double tracks were laid thereon and trains operated, and this continued until after 1872. In that year an act was passed (Ch. 702, Laws of 1872) under which the tracks were increased to four and were laid in a subway or cut bounded on both sides by masonry walls which rose to a height of three feet above the surface of the avenue. As soon as the work was completed the tracks were used for railroad purposes and so continued until the state compelled the road to abandon their use and to operate its cars upon the viaduct which was constructed by the state pursuant to ch. 339, Laws of 1892.

Without further reference to the history of the road in that avenue it may be said that *prior to* the time when the operation of its trains was transferred from the subway to the viaduct *it had acquired the right as against the abutting owners* to maintain its railroad and run its trains along and over Fourth avenue."

(*Id.*, p. 100):

"Although at the time of the decision of the *Lewis* case we accepted as sound the proposition that, when defendant commenced to use the steel viaduct, it started a new trespass upon the rights of the abutting owners for which it could properly be held liable, subsequent reflection persuaded the majority of the court that this was error. The reasoning which seemed to command the latter conclusion was, briefly, that the state, setting about making improvements in Fourth avenue which were to benefit the general public, *found defendant in possession of four tracks* in the middle of the avenue, *with the right to operate its trains upon them*, which it was enjoying. The state could not if it would—and probably would not if it could—deprive defendant of its right to operate its trains in the street. But it had the power in the public interest to compel it to run its trains upon a viaduct instead of in the subway. So the state builded the viaduct *over the part of the street formerly occupied by the subway*

and by lapse of time and the acquiescence of the plaintiff and his predecessors in title, the defendants, '*acquired the right* without liability to the plaintiff to have, maintain and use their railroad and railroad structures as the same were maintained and used prior to February 16th, 1897, as hereinbefore described.' Here we have an express finding that on and prior to the date named the defendants were entitled to have and maintain their railroad in the street in question *as against the plaintiff* and all the world, without let or hindrance from any one, and surely there could be no trespass upon the plaintiff's rights prior to that date. The trial court also found how the railroad had been maintained and operated on and prior to the date mentioned, as follows: 'The said railroad prior to February 16th, 1897, was operated along the center of said Park Avenue in front of the plaintiff's premises in a depressed cut about fourteen feet below the surface of said Park Avenue and sixty-one feet and eight inches wide, which said railroad cut was bounded on each side by parapet walls of about two feet six inches above the surface of said avenue, which said embankment or viaduct cut off access from one side of said avenue to the other, except at the intersection of 128th and 129th street, at which points there were bridges for vehicles and foot passengers across the said railroad cut.' *According to this finding the defendants had the right to maintain a railroad in front of the plaintiff's premises that practically cut him off from access to the opposite side of the street* except by means of bridges located at intersecting streets."

(*Id.*, p. 88):

"The railroad originally covered nearly 62 feet of the street surface. Now the elevated structure covers only 59 feet above the surface."

(*Id.*, p. 89):

"The elevated railroad cases in this court proceed upon the principle that, as against abutting owners, the railroad was unlawfully in the street, as *they had not consented to the construction or conveyed the right* to interfere with their easements. But in the case at bar we have an express finding that the defendant *had acquired the right as against the plaintiff* to use the street for the operation of the railroad. Hence, the principles upon which that mass of litigation proceeded have no application to this case, and so this court has held."

Muhlker case (*Id.*, pp. 97, 98):

"The facts in this case present the same question

that was before this court in the *Lewis Case* (162 N. Y. 202) and the *Fries Case* (169 N. Y. 270) and that is, whether defendant is liable for any damages that may have been sustained by plaintiff by reason of the interference with his easements of light air and access by the erection of the viaduct upon which its trains are now being run.

Defendant was incorporated in 1831, and in 1832 it took from one Poillon a deed to a strip of land 24 feet wide in the center of what is now known as Fourth avenue, in the city of New York, along which the premises belonging to plaintiff are situated. Subsequently double tracks were laid thereon and trains operated, and this continued until after 1872. In that year an act was passed (Ch. 702, Laws of 1872) under which the tracks were increased to four and were laid in a subway or cut bounded on both sides by masonry walls which rose to a height of three feet above the surface of the avenue. As soon as the work was completed the tracks were used for railroad purposes and so continued until the state compelled the road to abandon their use and to operate its cars upon the viaduct which was constructed by the state pursuant to ch. 339, Laws of 1892.

Without further reference to the history of the road in that avenue it may be said that *prior to* the time when the operation of its trains was transferred from the subway to the viaduct *it had acquired the right as against the abutting owners* to maintain its railroad and run its trains along and over Fourth avenue."

(*Id.*, p. 100):

"Although at the time of the decision of the *Lewis* case we accepted as sound the proposition that, when defendant commenced to use the steel viaduct, it started a new trespass upon the rights of the abutting owners for which it could properly be held liable, subsequent reflection persuaded the majority of the court that this was error. The reasoning which seemed to command the latter conclusion was, briefly, that the state, setting about making improvements in Fourth avenue which were to benefit the general public, *found defendant in possession of four tracks* in the middle of the avenue, *with the right to operate its trains upon them*, which it was enjoying. The state could not if it would—and probably would not if it could—deprive defendant of its right to operate its trains in the street. But it had the power in the public interest to compel it to run its trains upon a viaduct instead of in the subway. So the state builded the viaduct *over the part of the street formerly occupied by the subway*

and compelled it to stop running its trains in the subway and and to run them on the viaduct instead. The state had the power to do *these* things and *all* of them, and defendant, *having the right* to move its trains over the street, which could not be taken away from it, *did not lose that right and become a trespasser* because it obeyed the command of the statute, which it could not refuse to obey, to operate its trains upon the structure which the state had built."

Respectfully submitted,

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